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SUPREME COURT, U.S.
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No. 09-466

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEON WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

As the government explained in the petition for a writ of certiorari, this Court's review is necessary to resolve a deep and entrenched circuit conflict concerning the correct interpretation of the introductory "[e]xcept" clause of 18 U.S.C. 924(c)(1)(A). The Second Circuit's erroneous interpretation of that clause in the decision below and in *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), eliminates any term of imprisonment for a Section 924(c) conviction whenever a defendant is also convicted of a related offense that carries a higher mandatory minimum sentence. None of the eight other courts of appeals to consider the issue have accepted the Second Circuit's reading of the "except" clause. See Pet. 18-19. In those circuits, a defendant would receive a mandatory minimum term of imprisonment for violating Section 924(c) regardless of whether he was also

subject to a different mandatory minimum for another offense.

Respondent agrees that the conflict exists and does not dispute that the issue is important and recurring. Instead, he primarily focuses on the merits of the question presented, contending that the decision below is correct. He also argues that the nature of the circuit conflict and the posture of this case render certiorari inappropriate. Those contentions lack merit. The decision below is erroneous, the circuit conflict is fully developed, the conflict will not disappear without this Court's intervention, and this case presents a suitable vehicle to resolve it. Further review is therefore warranted.

1. Respondent acknowledges that there is a conflict between the courts of appeals on the question presented, but he contends that the conflict "may still resolve" itself without intervention by this Court. Br. in Opp. 13. That is highly unlikely. In both the decision below and *Whitley*, the Second Circuit denied the government's petitions for rehearing en banc asking the court to reconsider its position in light of the circuit conflict. Similarly, the courts of appeals that have rejected the Second Circuit's view have indicated no inclination to revisit their position in light of the Second Circuit's contrary interpretation. Since the Second Circuit issued *Whitley* and the decision below, three courts of appeals have reaffirmed their positions in separate panel decisions. See *United States* v. *Tate*, No. 09-10288, 2009 WL 3490293, at *8-*9 (11th Cir. Oct. 30, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009). And a number of courts of appeals have rejected oppor-

tunities to review the issue en banc in light of the decision below and *Whitley*. See, *e.g.*, *United States* v. *Gould*, 329 Fed. Appx. 569 (5th Cir. 2009) (per curiam), petition for cert. pending, No. 09-7073 (filed Oct. 16, 2009); *United States* v. *Abbott*, 574 F.3d 203 (3d Cir. 2009), petition for cert. pending, No. 09-479 (filed Oct. 19, 2009); *United States* v. *Acosta*, 333 Fed. Appx. 159 (8th Cir. 2009) (per curiam), petition for cert. pending, No. 09-7131 (filed Oct. 19, 2009); *United States* v. *Easter*, 553 F.3d 519, 525-527 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009).

Respondent argues that the circuit conflict is "young" and "immature" because "[m]ost of the cases that make up the split are quite recent." Br. in Opp. 13-14. But the numerous recent decisions addressing this issue simply illustrate that the question presented frequently arises. The arguments and competing positions have been fully developed and addressed in the courts of appeals. Indeed, five courts of appeals have announced their position after the Second Circuit adopted its interpretation of the "except" clause. See *United States* v. *Segarra*, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam); *Abbott*, 574 F.3d at 208-209; *London*, 568 F.3d at 564; *Pulido*, 566 F.3d at 65 & n.6; *Easter*, 553 F.3d at 525-527.* In doing so, four of those courts specifically considered and rejected the Second Circuit's contrary reasoning. See *Segarra*, 582 F.3d at 1272; *Abbott*, 574 F.3d at 209-211; *Pulido*, 566 F.3d at 65 n.6; *Easter*, 553

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* Although *Easter* was issued before the decision below, it was decided after *Whitley*, in which the Second Circuit established the interpretation of Section 924(c) to which it adhered in this case.

F.3d at 525-527. The question presented is ready for review by this Court.

2. Respondent does not dispute that the issue presented here is important and recurring. Because defendants are frequently convicted of both a Section 924(c) offense and a predicate offense that carries a higher mandatory minimum sentence, the question presented affects a large number of cases. Absent this Court's review, defendants in those cases will be subject to disparate mandatory sentences depending on the jurisdiction in which they are prosecuted. See Pet. 19-20. The volume of pending petitions in this Court presenting the issue demonstrates the frequency with which it arises. See, *e.g.*, *Garton* v. *United States*, petition for cert. pending, No. 09-7433 (filed Oct. 20, 2009); *Abbott* v. *United States*, petition for cert. pending, No. 09-479 (filed Oct. 19, 2009); *Acosta* v. *United States*, petition for cert. pending, No. 09-7131 (filed Oct. 19, 2009); *Vargas* v. *United States*, petition for cert. pending, No. 09-7127 (filed Oct. 19, 2009); *Gould* v. *United States*, petition for cert. pending, No. 09-7073 (filed Oct. 16, 2009); *Wadford* v. *United States*, petition for cert. pending, No. 09-7168 (filed Sept. 8, 2009); *London* v. *United States*, petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *Pulido* v. *United States*, petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *Lee* v. *United States*, petition for cert. pending, No. 09-5248 (filed July 9, 2009); *McSwain* v. *United States*, petition for cert. pending, No. 08-9560 (filed Mar. 26, 2009); see also, *e.g.*, *United States* v. *Haynes*, 582 F.3d 686, 712 (7th Cir. 2009) (noting that the defendant had raised the "except" clause issue in order to preserve it "for review in the Supreme Court"). This Court's resolution of the circuit conflict is necessary.

3. This case squarely presents the "except" clause issue. See Pet. 20-21. There is no merit to respondent's contention (Br. in Opp. 15) that review is inappropriate because the court of appeals remanded for resentencing. While many criminal cases in an interlocutory posture do not warrant this Court's review, this case exemplifies the situation in which certiorari is justified, because the need for a remand was created by the ruling from which the government seeks review. The Court has in other cases granted the government's petition for a writ of certiorari in federal criminal cases in which a court of appeals has remanded for further proceedings, but a controlling legal issue that will govern further proceedings warrants the Court's attention. See, *e.g.*, *United States* v. *Ressam*, 474 F.3d 597, 599 (9th Cir. 2007) (remanding for resentencing after reversing imposition of mandatory minimum), rev'd, 128 S. Ct. 1858 (2008); *United States* v. *Gonzalez-Lopez*, 399 F.3d 924, 935 (8th Cir. 2005) (remanding for new trial), aff'd, 548 U.S. 140 (2006); *United States* v. *Grubbs*, 377 F.3d 1072, 1080 (9th Cir. 2004) (remanding to permit withdrawal of conditional guilty plea), rev'd, 547 U.S. 90 (2006); *United States* v. *Booker*, 375 F.3d 508, 514 (7th Cir. 2004) (remanding for resentencing), aff'd, 543 U.S. 220 (2005); *United States* v. *Putra*, 78 F.3d 1386, 1390 (9th Cir. 1996) (same), rev'd *sub nom. United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam); *United States* v. *Gonzales*, 65 F.3d 814, 823 (10th Cir. 1995) (same), vacated, 520 U.S. 1 (1997). Because the proper interpretation of the "except" clause is "fundamental to the further conduct of the case," *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945), this Court's review is warranted at this time.

4. Respondent devotes his brief in opposition primarily to defending the decision below on the merits. Br. in Opp. 2-12. In general, respondent's arguments paraphrase the Second Circuit's reasoning, and as the government explained in the petition, that reasoning is erroneous. See Pet. 9-18.

Respondent attempts to supplement the Second Circuit's reasoning by placing particular emphasis on *United States* v. *Gonzales*, 520 U.S. 1 (1997), contending that it compels the result below. Br. in Opp. 6-8. That argument is incorrect. In *Gonzales*, this Court interpreted the phrase "any other term of imprisonment" in a previous version of Section 924(c) to denote any federal or state term of imprisonment. 520 U.S. at 5. But while any has an "expansive" meaning, *ibid.*, that word, like all others, must be read in context, and this Court has often recognized that "any" does not automatically reach all objects indiscriminately. See *Small* v. *United States*, 544 U.S. 385, 388 (2005) (statutory phrase "convicted in any court" does not answer whether it applied to foreign courts); *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("any" means "different things depending upon the setting"); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (declining to construe phrase "any" law enforcement officer "without considering the rest of the statute"). "Thus, even though the word 'any' demands a broad interpretation, * * * [courts] must look beyond that word itself." *Small*, 544 U.S. at 388 (citation omitted). As eight courts of appeals to consider the issue have concluded, reading the term "any" in the context of the "except" clause to include literally any provision of law ignores the surrounding language of the statute and contravenes related subsections of Section 924(c). See Pet. 10-16.

Indeed, in the decision below, the Second Circuit itself declined to adopt respondent's purportedly "literal" reading of the phrase "any other provision of law." The court deemed "suspect" an "unbounded" reading of Section 924(c), under which the term "any" would literally "include, for example, provisions under which a defendant was already sentenced for a prior unrelated crime." Pet. App. 9a-10a. The Second Circuit therefore engrafted onto the "except" clause a limitation to offenses arising from the "same criminal transaction," *id.* at 10a, whether or not charged in the same indictment or information, *id.* at 10a n.4. But as the government has explained, Pet. 13-14, that interpolation is both unsupported by the statutory text and unnecessary to effectuate the statute's plain meaning. The "unbounded" reading of the "except" clause the court sought to avoid arose only because the court failed to observe the limitation inherent in the statute itself—that the clause applies only where another provision of law prescribes a greater mandatory minimum for the Section 924(c) offense.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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